

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OPERATIVE PLASTERERS' & CEMENT
MASONS' INTERNATIONAL ASSOCIATION,
LOCAL 200, AFL-CIO AND OPERATIVE
PLASTERERS' & CEMENT MASONS'
INTERNATIONAL ASSOCIATION, AFL-CIO

Case Nos. 21-CD-659

21-CD-660

and

21 - CD-661

STANDARD DRYWALL, INC.

and

SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA

**REPLY BRIEF OF RESPONDENT OPERATIVE PLASTERERS' & CEMENT
MASONS' INTERNATIONAL ASSOCIATION, LOCAL 200'S TO ANSWERING
BRIEF FILED BY COUNSEL FOR THE GENERAL COUNSEL**

Respectfully submitted,

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INTRODUCTION

Pursuant to sections 102.46(h) of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. §§ 120.46(h) (2007), Respondent Operative Plasterers' & Cement Masons' International Association, AFL-CIO, Local 200 ("Local 200") respectfully submits this Reply Brief to the Answering Brief filed by Counsel for the General Counsel.

ARGUMENT

I. Neither Counsel for the General Counsel Nor Standard Drywall Has Offered Any Reasoned Defense of the ALJ's Refusal to Allow Respondents to Litigate Essential Elements of the 8(b)(4)(ii)(D) Charges.

In its exceptions to the Administrative Law Judge's decision, Local 200 explained the error of the ALJ's decision to preclude Respondents from seeking or presenting evidence demonstrating that no *bona fide* jurisdictional dispute exists and that the dispute here is a product of collusion between Standard Drywall and the Carpenters. Local 200's Brief in Supp. of Exceptions, at 11-18. The ALJ's decision in this regard departed from the rule set forth in *Warehouse Union Local 6 (Golden Grain Macaroni Co.) ("Golden Grain II")*, 289 NLRB 1 (1988), which holds that 8(b)(4)(ii)(D) respondents are entitled to litigate any element of the 8(b)(4)(ii)(D) charges, including whether the dispute is genuinely "jurisdictional," regardless of whether the same factual issues were raised and adjudicated in the underlying 10(k) proceeding. The ALJ also mis-interpreted the Board's decision in *Tile, Marble, Terrazo Finishers & Shopworkers, Local 47-T (Grazzini Bros.)*, 315 NLRB 520 (1994) as holding that the issue of "whether there has been collusion affecting the issue of the validity of the jurisdictional dispute" may not be re-litigated in 8(b)(4)(ii)(D) proceedings. *See* ALJD, Exh. 3 n. 4. *Grazzini Brothers*, however, was a straightforward application of the

summary judgment standard set forth in *Golden Grain II* to contentions of collusion that were also raised in the underlying 10(k) proceeding. It does not stand for the proposition that Respondents to an 8(b)(4)(ii)(D) charge are precluded from re-litigating the issue of collusion in subsequent unfair labor practice proceedings. Local 200's Brief in Support of Exceptions, at 16-17.

A finding that a genuine jurisdictional dispute exists is essential to any holding that Respondents violated the Act. *See, e.g., Highway Truckdrivers & Helpers, Local 107 (Safeway Stores, Inc.)*, 134 NLRB 1320, 1321 (1961); *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820 (1986) *aff'd USCP-Wesco v. NLRB*, 827 F.2d 581 (9th Cir. 1987); *Seafarers (Recon Refractory & Constr.)*, 339 NLRB 825, 827 (2003) *aff'd Recon Refractory & Constr. Inc. v. NLRB*, 424 F.3d 980, 988-991 (9th Cir. 2005); *IAM, District 190 (SSA Terminal)*, 344 NLRB No. 126, *slip op.* at 4-5 (2005).

The fact that this issue was also relevant to the Board's determination in the underlying 10(k) proceedings that "reasonable cause" existed to find that the Carpenters violated 8(b)(4)(ii)(D) did not permit the ALJ to prohibit Respondents from establishing in *this 8(b)(4)(ii)(D) proceeding* that substantial evidence does not support such a conclusion. *Golden Grain II*, 289 NLRB at 2; *Int'l Longshoremen's & Warehousemen's Union, Local 14 (Sierra Pacific Indus.)*, 318 NLRB 462, 464 (1995); *IT&T*, 419 U.S. at 445 & n.16 ("The Board's attention in the 10(k) proceeding is not directed to ascertaining whether there is substantial evidence to show that a union has engaged in forbidden conduct with a forbidden objective. Those inquiries are left for the s 8(b)(4)(D) proceeding.").

If left uncorrected, the ALJ's failure to permit Respondents to make a record of Standard Drywall's receipt of substantial, collusive payments from the Carpenters will be a basis for denying enforcement of any ultimate order. *See Laborers' Local 190 (ACMAT Corp.)*, 306 NLRB 93 (1993) *enf. denied Laborers' Local 190 v. NLRB*, 998 F.2d 1064, 1065-66 (D.C. Cir. 1993) (denying enforcement of Board order of 8(b)(4)(ii)(D) liability where the Board "refused to consider evidence proffered by Local 190 to show that ACMAT had signed a CBA with the Sheet Metal Workers Union only after (and presumably because) the Sheet Metal Workers Pension Fund had made a large investment in ACMAT.").

Neither Standard Drywall nor Counsel for the General Counsel forward any reasoned defense of the ALJ's ruling in this regard.

Standard Drywall argues that the Board's interlocutory order upholding of the ALJ's decision to preclude evidence is the "law of the case" and may not be revisited. *See* Standard Drywall's Answering Br., at 22. This argument is contradicted by Standard Drywall's own cross-exception to the portion of the Board's interlocutory order making the records in the underlying 10(k) proceedings part of the record in this proceeding. *See* Standard Drywall's Cross-Exceptions, ¶ 3.

In any case, Standard Drywall is incorrect as a matter of law. The Board has the authority to revisit interlocutory orders any time prior to a final decision in the case. *See, e.g., Highland Yarn Mills, Inc.*, 315 NLRB 1169, 1169 n. 3 (1994) ("In vacating this Order, the Board notes that it was purely interlocutory and could have been reconsidered by the Board *sua sponte* at any time prior to a final decision in the case."); *Serv-U Stores, Inc.*, 234 NLRB 1143, 1143 (1978) (reconsidering *sua sponte* a previous Decision and Order "with respect

to . . . the question whether the supervisory status of the store managers was properly relitigated at the instant hearing following the Board's action in granting the General Counsel's interlocutory appeal from the Administrative Law Judge's refusal to take evidence on the matter").

Counsel for the General Counsel misunderstands the basis for Local 200's exceptions to the ALJ's evidentiary rulings. Counsel for the General Counsel argues that "Respondents have made it clear that they believe the Board's findings and conclusions in SDI I and SDI II were 'clearly erroneous' and worked a 'manifest injustice' that affects many parties."¹ Whether or not the 10(k) proceedings in *SDI I* and *SDI II* were correctly decided is not the point. At issue is whether Respondents have been given the opportunity to litigate (and create a full record on) the *Section 8(b)(4)(ii)(D)* charges against them, including the question of whether there is a genuine jurisdictional dispute upon which Section 8(b)(4)(ii)(D) liability may rest. Because they have not, Exceptions 1, 2, and 3 must be granted.

II. There Is No Record Evidence Supporting a Conclusion that OPCMIA Acted As Local 200's Agent in Seeking Enforcement of the Kelly or Greenberg Awards.

Local 200 has excepted to the ALJ's conclusion that it can be held liable for the OPCMIA's alleged attempts to enforce the Kelly and Greenberg arbitration awards in January 2007, after the 10(k) award in *SDI-II*. Local 200's Exceptions to ALJ's Decision,

¹ Counsel for the General Counsel cites Local 200's Brief in Support of Exceptions, at 18-19. Nowhere on the cited pages does Local 200 use the words quoted by the General Counsel. Rather, "Respondents respectfully submit that both the ALJ decision and the Board's interlocutory order affirming that decision constitute clear legal error, are a substantial departure from past Board precedent, and have deprived Respondents of their right to fully litigate the charges against them." Local 200's Brief in Support of Exceptions, at 11.

Exception No. 4. The ALJ described the actions on which Local 200 was held liable as follows:

On January 9, 2007, the International requested the Plan administrator file a complaint against SDI seeking plastering work at all Los Angeles Unified School District public works projects in the 12 Southern California counties. On January 13, 2007 the International withdrew this complaint conditionally and stated that if it found work was included under the Plan it would reinstate the complaint.

On January 9, 2007 the International advised the Plan administrator it withdrew its request for enforcement of the Kelly and Greenberg awards because SDI was in compliance with those awards.

ALJD, at 5. As the ALJ recognized, “[t]he record establishes that only the International may pursue a grievance under the Plan even though it is for the benefit of the local union.” ALJD, at 5.

The simple fact is that none of this allegedly coercive conduct described by can be attributed to Local 200. The record contains no evidence whatsoever that Local 200 had any fore-knowledge of OPCMIA’s actions in January 2007, that Local 200 condoned such action, or that OPCMIA acted as Local 200’s agent in carrying out such actions. Indeed, the only evidence that Charging Party Standard Drywall can cite in its defense of the ALJ’s decision in this regard is that when OPCMIA requested that the Plan take action to enforce the Kelly and Greenberg awards, “[a] copy of the demand was sent to Local 200.” Standard Drywall’s Answering Br., at 30; *see also id.* (noting that a copy of OPCMIA’s subsequent letter withdrawing the request was sent to Local 200); *id.* at 31 (noting that a copy of OPCMIA’s January 9, 2007 complaint letter to the Plan Administrator was sent to Local 200).

The mere fact that OPCMIA's actions are alleged to have been carried out for Local 200's benefit is no basis for finding that Local 200 violated the Act. Rather, "under Section 2(13) of the Act, employers and unions are responsible for the acts of their agents in accordance with ordinary common-law rules of agency." *Overnite Trans. Co.*, 334 NLRB 1074, 1078 (2001). "[U]nder 'hornbook agency law[,] . . . an agency relationship arises only where the principal 'has the right to control the conduct of an agent with respect to the matters entrusted to him.' " *Id.* (quoting *Longshoremen ILA v. NLRB*, 56 F.3d 205, 213 (D.C. Cir. 1995)).

As in *Overnite Transportation Co.*, the record here provides no basis for a finding that Local 200 exercised control over OPCMIA in its communications to the Plan Administrator in 2007. In fact, as the ALJ recognized, only the OPCMIA has authority to pursue grievances under the Plan.

The only authority cited by the ALJ, *Standard Drywall* or *Counsel for the General Counsel* in support of finding Local 200 liable for OPCMIA's January 2007 actions are obviously inapplicable. In *Ironworkers Local 433 (Swinerton & Walberg Co.)*, 308 NLRB 757, 761 (1991) and *Ironworkers Local 433 (Otis Elevator Co.)*, 309 NLRB 273 (1992), the issue was whether the parent body (the "District Council") could be held liable under Section 8(b)(4)(ii)(D) *for its own conduct*. In each case, the Board rejected the District Council's argument that it could not be held liable under Section 8(b)(4)(ii)(D) because it had not been a party to the underlying Section 10(k) proceedings. Neither case holds that a local union may be held liable for the actions of its parent merely because the local union is alleged to benefit from those actions.

Thus, in *Swinerton & Walberg*, the District Court was charged with violating Section 8(b)(4)(ii)(D) by maintaining a federal court “petition to compel arbitration on behalf of it and its affiliated local unions.” *Swinerton & Walberg Co.*, 308 NLRB at 756. Only the District Council, and not the Local, was a party to the lawsuit. The Board rejected the District Council’s argument that it could not be liable under Section 8(b)(4)(ii)(D) because it had not been a party to the underlying 10(k) proceeding. *Id.* The Board enforced the ALJ’s conclusion of law that “Respondent District Council . . . has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act by maintaining a lawsuit in the U.S. district court seeking to compel S&W to arbitrate certain in lieu of grievances and by maintaining an appeal from the dismissal of said lawsuit.” *Id.* at 757, 762. The Board held the District Council, *but not the Local*, liable for maintaining the lawsuit. *Id.* In other words, the mere fact that the District Council had brought the lawsuit for the benefit of the Local did not mean that the Local could be liable for this action.

In *Otis Elevator*, both Local 433 and the District Council filed lawsuits seeking to compel arbitration. *Otis Elevator*, 309 NLRB at 281. Therefore, the issue of whether Local 433 could be held liable for actions taken by the District Council alone did not arise. *See id.* at 274.

Neither *Swinerton & Walberg* nor *Otis Elevator* support the ALJ’s conclusion that Local 200 can be held liable for OPCMIA’s actions in January 2007 merely because those actions are alleged to have benefitted Local 200. Indeed, *Swinerton & Walberg* demonstrates that only OPCMIA is a proper respondent to allegations that such conduct violated Section 8(b)(4)(ii)(D).

Counsel for the General Counsel's only argument on this point is that "[i]nasmuch as Respondents have raised no new issues or law not considered by the ALJ, their exceptions to this finding must be rejected." Counsel for the General Counsel's Answering Br., at 17. It is unclear what Counsel believes the purpose of exceptions to the ALJ's decision to be. Respondents have demonstrated that the ALJ did not reasonably apply the law and that Local 200 may not be held liable under Section 8(b)(4)(ii)(D) for OPCMIA's alleged attempts to enforce the Plan grievances.

III. Local 200 Joins in OPCMIA's Responses to Counsel for the General Counsel's Answering Brief.

Local 200 joins in the OPCMIA's Reply Brief to the Answering Brief Filed by the Counsel for the General Counsel. As the OPCMIA's Reply Brief demonstrates, the ALJ erred in concluding that OPCMIA's actions after the issuance of the 10(k) award in *SDI II* constituted "coercion" within the meaning of Section 8(b)(4)(ii)(D).

IV. The *Pullen* and Tortious Interference Lawsuits Do Not Violate Section 8(b)(4)(ii)(D).

Counsel for the General Counsel's defense of the ALJ's conclusion that Local 200 violated Section 8(b)(4)(ii)(D) by filing and maintaining the *Pullen* and Tortious Interference Lawsuits fails to substantively address any of the arguments made in Local 200's brief in support of its exceptions. For the reasons set forth in Local 200's Reply to the Answering Brief Filed by Standard Drywall, Local 200's filing and maintaining these lawsuits does not violate Section 8(b)(4)(ii)(D) of the Act.

Following its decision in *BE&K Construction Co.*, 351 NLRB No. 29 (2007), the Board may not hold a lawsuit to violate the Act unless the lawsuit is subjectively and

objectively baseless. The *Pullen* and Tortious Interference Lawsuits, which are still pending in state court, are not legally baseless.

As Local 200 has argued at length, however, even under pre-*BE&K Construction* precedent, the lawsuits do not conflict with the 10(k) award in *SDI II* and therefore are not coercive under Section 8(b)(4)(ii)(D) of the Act. *See* Local 200's Reply to Standard Drywall's Answer Br., at 9-10; Local 200's Exceptions Br., at 40-42, 46-47.

Counsel for the General Counsel argues that the *Pullen* Lawsuit is analogous to the pursuit of an "in-lieu" grievance after the issuance of a contrary 10(k) award. General Counsel's Answering Br., at 14 (citing, *inter alia*, *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273 (1992); *Longshoremen ILWU Local 13 (Sea-Land Services)*, 290 NLRB 616 (1988)). However, even under the theory that the *Pullen* Lawsuit involves jurisdictional issues (*cf.* Local 200's Reply to Standard Drywall's Answer Br., at 9; Local 200's Exceptions Br., at 40-42), it is not analogous to an "in-lieu-of" grievance. To be actionable under Section 8(b)(4)(ii)(D), such grievances must threaten the employer with *ongoing liability* after issuance of the 10(k) award for the employer's failure to award the disputed work to the grieving union. *Weyerhaeuser*, 271 NLRB at 762. Since November 3, 2006 (*prior to* the Board's 10(k) award in *SDI-II*), however, Standard Drywall has been able to hire state-registered apprentices from either a program sponsored by Local 200 or a program sponsored by the Carpenters. Even if the state law requirement that Standard Drywall hire registered apprentices can be seen as jurisdictional within the meaning of the Act, Standard Drywall can comply with both state law and the 10(k) award by hiring apprentices from the Carpenters' apprenticeship program.

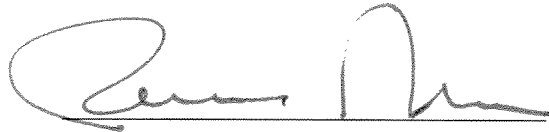
CONCLUSION

Counsel for the General Counsel fails to provide any reasoned defense of the ALJ's errors of law. Local 200 respectfully requests that the Board grant Local 200's exceptions, set aside the ALJ's findings of fact and conclusions of law, and hold that Local 200 has not violated Section 8(b)(4)(ii)(D) of the Act.

Dated: May 16, 2008

Respectfully submitted,

DAVIS, COWELL & BOWE LLP

A handwritten signature in black ink, appearing to read "John J. Davis, Jr.", written over a horizontal line.

JOHN J. DAVIS, JR.

PAUL L. MORE

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am a citizen of the United States and a resident of the State of California. I am over the age of eighteen years and not a party to the within matter. My business address is 595 Market Street, Suite 1400, San Francisco, CA 94105. On the date last written below, I served the following documents described as:

REPLY BRIEF OF RESPONDENT OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL 200'S TO ANSWERING BRIEF FILED BY COUNSEL FOR THE GENERAL COUNSEL

Re: National Labor Relations Board Case No.: 21-CD-659, 21-CD-660, 21-CD-661

on the parties in said cause, by placing true copies thereof in sealed envelopes addressed as shown below, by the method of service shown below:

- [X] **By Express Service Carrier.** I caused the above-referenced document(s) together with an unsigned copy of this declaration, in an envelope designated by said express service carrier, to be delivered to United Parcel Service (UPS), a courier service, for delivery as specified to the below addressee(s).
- [X] **By Electronic E-mail Transmission:** I sent such document(s) by use of electronic mail to the above email address(es) on the date indicated above. Such document(s) were/was scanned to PDF format and emailed, without error, to such recipient whose e-address is indicated below.


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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed May 20, 2008, at San Francisco, California.


Verna Owens